State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Conway School District Petitioner	*	
v.	*	Case No. M-0560-7
Conway Education Support Personnel, NEA-New Hampshire Respondent	*	Decision No. 2005-145

APPEARANCES

Representing Conway School District:

Matthew H. Upton, Esquire
Upton, Sanders & Smith

Representing Conway Education Support Personnel:

James F. Allmendinger, Esquire
NEA-New Hampshire

BACKGROUND

The Conway School District ("the District") filed a Petition for Declaratory Ruling on January 19, 2005, seeking a decision from the Public Employee Labor Relations Board ("PELRB" or "Board") on whether a certain individual is eligible for health insurance benefits under the terms of the parties' collective bargaining agreement ("CBA"). Although the parties' CBA provides that retiring employees who have worked for the District for at least ten (10) years will be eligible for the health insurance benefits available to active employees, the District states that Mr. Lopez was neither a member of the bargaining unit, nor an employee of the District at the time he retired. The District therefore asks the Board to determine under the circumstances whether or not Mr. Lopez is eligible for contractual health benefits. Since to date it has agreed to provide health insurance to Mr. Lopez, with a full reservation of rights, it also asks the Board to determine who is responsible for the premiums paid to the date of the Board's declaratory ruling.

The Conway Education Support Personnel, NEA-New Hampshire ("the Association") filed an answer to the petition on behalf of Mr. Lopez on February 7, 2005. The Association submits that the CBA draws a clear distinction between layoffs and terminations, and that Mr. Lopez was laid off, not terminated. As explained by the Association, employees such as Mr. Lopez are eligible for recall for up to a year and do not lose any seniority. Since Mr. Lopez has more than ten (10) years employment with the District, the Association asserts that he is therefore eligible for the health insurance plan under the parties' CBA. The Association requests, among other things, that the Board rule that Mr. Lopez is entitled to insurance benefits as a retiree.

A pre-hearing conference was convened at PELRB offices on March 16, 2005. Pursuant to the Pre-hearing Memorandum and Order issued on March 21, 2005 (PELRB Decision No. 2005-042), the parties' representatives were directed to meet, or otherwise confer, in an attempt to reach a stipulation on presenting the instant case by written submission, or, in the alternative, without the need for formal testimony. As reflected in an Order dated April 13, 2005 (PELRB Decision No. 2005-053), the parties representatives informed the PELRB Hearing Officer that they had reached a joint "Statement of Agreed Facts" and that, based upon such agreement, an evidentiary hearing was no longer necessary. The parties' representatives were directed to execute the "Statement of Agreed Facts" and to file said document with the PELRB on or before April 26, 2005, along with their respective memorandums of law. The filing deadline was subsequently extended to May 4, 2005. As referenced in an Interim Order dated June 2, 2005 (PELRB Decision No. 2005-066), the Board convened on May 16, 2005 for the purpose of deliberations regarding the parties' stipulated record and written arguments in this matter. Upon review, it determined that a hearing was necessary, which, in due course, was scheduled for and held on August 30, 2005. At the conclusion of the August 30th hearing, the record was closed. Upon review of all filings and relevant evidence submitted by the parties, and consideration of the "Statement of Agreed Facts," incorporated in Findings of Fact paragraph 4 below, the Board determines the following:

FINDINGS OF FACT

1. The Conway School District ("the District") is a public employer within the meaning of RSA 273-A:1 X.

2. The Conway Education Support Personnel/NEA-New Hampshire ("the Association") is the duly certified exclusive bargaining representative for certain employees, employed by the District, including support staff.

3. Joseph Lopez is a public employee within the meaning of RSA 273-A:1, IX.

4. Counsel for the District and the Association executed the following agreed statement of facts and submitted same to the PELRB for consideration in the instant case:

A. Mr. Lopez was hired on or about December 9, 1985, as an aide in the Conway School District (the School District or the District). *Appendix at 1.*[1] Mr. Lopez was employed as an aide by the School District for nearly 19 years.

B. Mr. Lopez was a member of the Conway Educational Support Personnel, NEA-New Hampshire (the association) for those 19 years and a member of the bargaining unit of support staff in the School District represented by the association.

C. By a letter dated June 3, 2004, Mr. Lopez was informed that he would be laid off from his position as aide with the District due to a reduction in personnel. Mr. Lopez's layoff was effective June 22, 2004, the last day of the school year. *App. 6.* (Unless otherwise noted, all dates herein are 2004.)

D. On June 17, 2004, the District mailed Mr. Lopez an Extension of Health Benefits Under NH RSA 415:18 and COBRA 1986. On July 1, 2004, the District received back from Mr. Lopez the signed form. *App. 7.*

E. Mr. Lopez states that he filed a grievance with the District contesting his layoff on or about July 14. *App. 8-10.* The School District disputes this, and states that Mr. Lopez never filed a grievance and that the School District never received a copy of the grievance allegedly filed by Mr. Lopez until after this dispute arose.

F. On or about August 11, Mr. Lopez telephoned Jim Hill, Business Manager for the District, indicating that he wanted to retire and receive his health insurance benefits, and that Mr. Lopez also wanted to remain on the recall list should a position become available. The School District noted Mr. Lopez's telephone call in an email from the business administrator to other district administrators. *App. 11.* That email also stated the School District's position: "he [Mr. Lopez] isn't currently employed by the District, therefore he can't retire from a place where he doesn't work." Id. The email continued by noting that "he [Mr. Lopez] said he'd check with counsel and call me [the business administrator] back. . . [but] I'd suggest any future requests be done in writing. He [Mr. Lopez] agreed." *Id.*

G. On August 11, Mr. Lopez's association representative, UniServ Director Jay Tolman, wrote the District a letter stating that Mr. Lopez had a right to retire and to receive partially paid health insurance benefits under the collective bargaining agreement between the District and the Union. That letter also asserted rights with regard to the grievance allegedly filed by Mr. Lopez. *App. 12.*

H. On August 16, the District received a letter from Mr. Lopez stating his intent to retire. *App. 13.* Mr. Lopez's letter also states that he has a grievance pending and expects to remain on the recall list for the District. *Id.*

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[1] The parties attached an appendix to their agreed statement of facts, consisting of various documents and a total of 46 pages. References to the "joint" appendix will hereinafter be cited as "*App.* ___."

I. By a letter dated August 16, Mr. Lopez's association representative inquired about the District's written response to the grievance. *App. 14*

J. On August 31, the District agreed to provide health insurance to Mr. Lopez with a full reservation of rights given that Mr. Lopez was unwilling to enter into an agreement to reimburse the District for premiums paid by the pending resolution of this dispute. *App. 22-24.*

K. This followed a series of exchanges among Mr. Lopez, his association representative, and the attorney for the School District that continued into September. *App. 15-19.*

L. None of those exchanges discusses Mr. Lopez's grievance. *Id.*

M. Mr. Lopez has been laid off from aide positions in the Conway School District in the past, and then recalled. On May 23, 1990, Mr. Lopez was laid off. App. 2. He was recalled on September 10, 1990. App. 3. He was again laid off on July 27, 2000. App. 4. That year, he was recalled on August 16. *App. 5.*

N. Bargaining unit members are eligible for recall for up to one year after they are laid off based on their seniority while on the recall list under Section 12.3 of the CBA.

O. Bargaining unit members who have been employed by the District for more than 10 years and retire are eligible for retiree health insurance benefits under Section 14.1.B of the CBA.

P. The collective bargaining agreement draws a distinction between layoffs and terminations. Section 12.3 of the agreement states that laid off employees are eligible for recall for up to a year and do not lose any seniority while on the recall list. Section 11.5 of the agreement provides that employees who are terminated immediately lose all of their seniority.

Q. The association's President, Mary Broomhall, in a memorandum dated September 15, asked Maureen Soraghan, an administrator in the district, that the next person on the recall list be recalled. *App. 20.*

R. On October 7, 2005[4], the association's UniServ Director repeated the request to the Superintendent that the next person on the recall list be rehired, on the understanding that Mr. Lopez is the next person on the recall list. *App. 21.*

S. The District's business administrator, James Hill, has told the association and the Hearing Officer for the Public Employee Labor Relations Board that no additional aides will be recalled from the list during the 2004-2005 school year.

T. Other bargaining unit employees with ten years' seniority and who have retired receive the disputed health insurance benefits, including Pat Philbrick, Laine Latham, Dorothy Hamilton, Peggy Santuccio, Diane Plechky and Jerry Avoni. However, all of these individuals announced their retirements prior to their last day of employment and none were laid off.

U. In April 2005, Mr. Lopez filed paperwork with the New Hampshire Retirement System exploring retirement.

5. The District and Association are parties to a CBA for the period July 1, 2003 to June 30, 2005. *App. 25.*

6. The recognition provisions contained in the parties' CBA, define "employee" as referring to "all members of the above defined bargaining unit [set forth in Article 1.1]," but contains the qualifier "unless otherwise indicated." *App. 27.*

7. Article 11.2 of the CBA provides that seniority shall be lost by an employee upon termination, resignation, retirement, or transfer to a non-bargaining unit position. *App. 33.*

8. Laid off employees retain their seniority for up to one year under Article 12.3. *App. 34.* Moreover, a "[r]efusal to accept a position resulting from layoff or recall from layoff shall result in loss of seniority." *App. 34.*

9. A layoff is not considered or treated the same as a termination within the District. Under a layoff, and pursuant to Article XII of the CBA, an employee remains on a recall list for a period of up to one year and retains his/her seniority during that period. *App. 34.* On the other hand, a terminated employee has no recall rights, seniority is lost (*App. 33*) and the employment relationship is ended.

10. There is no specific deadline set forth in the parties' CBA for either retiring from employment or applying for retiree health insurance benefits. In order to be eligible for retiree health insurance under Article 14.1.B, an individual must have a minimum of ten (10) years of work for the District and retire after June of 1997. *App. 37.*

DECISION AND ORDER

JURISDICTION

The Board's jurisdiction in the instant matter is satisfied pursuant to RSA 541-A and Pub 206.01, which allow for a party to petition the Board for a ruling regarding the applicability of any statute within the jurisdiction of the board to enforce. Here we accept and consider the District's petition in that it seeks a ruling as to whether or not Mr. Lopez is eligible for retiree health insurance benefits under the terms of the parties' CBA. This question necessarily calls for an interpretation of specific terms set forth in the parties' CBA. Since a breach of a CBA by a public employer constitutes an unfair labor practice under RSA 273-A:5 I (h), we therefore

construe the District's petition as seeking a ruling regarding the applicability of this statutory provision. In other words, would the District be committing an unfair labor practice, within the meaning of RSA 273-A:5 I (h), if it refused to provide Mr. Lopez with retiree health insurance benefits?

We are mindful that it is traditionally the role of an arbitrator appointed pursuant to the parties' mutually negotiated grievance procedure to resolve disputes arising out the terms of the parties' contract. Under these circumstances, however, no grievance was ever filed, presumably because the public employer has granted the benefits to Mr. Lopez from the outset, albeit with a reservation of rights as it pursued an answer to the question before us. We recognize that if we declined to consider the instant petition and the benefits were thereafter rescinded, a grievance or other litigation would likely result. We therefore undertake a consideration of the instant petition in the interest of presently fostering harmonious relations between this public employer and its employees and to avoid contentious litigation between these parties in the future on this issue.

DISCUSSION

This case, brought in the form of a Petition for Declaratory Ruling, asks the Board to resolve the issue of Mr. Lopez' eligibility for health insurance benefits by interpreting the parties' contract. The majority concludes that Mr. Lopez is eligible to receive health insurance benefits under the parties' CBA, and therefore the District would be committing an unfair labor practice by depriving him of said benefits.

When called upon to interpret contract language, the Board shall focus "on the language of the CBA, as it reflects the parties intent...This intent is determined from the agreement taken as a whole, and by construing its terms according to the common meaning of their words and phrases." *Appeal of Town of Bedford*, 142 N.H. 637, 641 (1998). Here, the parties specifically agreed in Article 14.1.B that "[a]ll eligible employees who have worked in the...District for at least ten (10) years and retiring after June of 1997 will be eligible for the health insurance plan available to active employees consistent with the terms of the collective bargaining agreement at the same co-pay as active employees." *App. 37.* This language, on its face, provides health insurance for "eligible employees" and that eligibility being contingent upon working for the District for at least ten (10) years and retiring after June of 1997. (Finding of Fact, No. 10). There is no dispute that Mr. Lopez has worked for the District for a period of nearly 19 years and that he made application for retiree health insurance benefits after July 1997, specifically in August 2004. (Finding of Fact, No. 4, ¶¶ 1, 6-8). In satisfying these two criteria, the majority finds Mr. Lopez to be an "eligible employee" within the meaning of Article 14.1.B.

In applying the rule "*expressio unius est exclusio alterius* ('the expression of one thing is the exclusion of another')," [2] the majority concludes that there are currently no other conditions limiting his access to this benefit. The District would have the Board effectively establish a time deadline for filing for retirement under the contract, but to do so would be the same as altering or amending the terms of the parties' agreement without their mutual consent. Where the parties "have chosen to bargain over matters not otherwise prohibited from negotiation, the parties must

[2] ELKOURI AND ELKOURI, HOW ARBITRATION WORKS, 6th Ed., 467-468 (2003).

abide by the agreement entered into during the term of the CBA." *Appeal of Pittsfield School District*, 144 N.H. 536, 540 (1999).

The majority observes that Mr. Lopez' status as an "eligible employee" is supported by other provisions within the parties' agreement. The parties' contract contemplates that laid off employees, such as Mr. Lopez, are still considered "employees" for at least a year, and have not been terminated. The language contained in Article 12.3, the "Reduction in Personnel, Layoff and Recall" article, describes those who have been laid off as "employees," and specifically provides that "[a]ll employees who have been laid off will be kept on a recall list for a maximum of one (1) year." (Finding of Fact, No. 8). Consistent therewith, testimonial evidence presented at hearing established that employees who have been laid off are not treated the same as those who have been terminated. District Superintendent Dr. Carl Nelson testified that laid off employees maintain an employment relationship with the District for a one (1) year period, based upon recall rights, whereas those individuals who have been terminated have no continuing employment relationship with the District. (Finding of Fact, No. 9).

In this regard, the parties agreed under Article 11.5 that "[s]eniority shall be lost by an employee upon termination, resignation, retirement, or transfer to a non-bargaining unit position" and under Article 12.3 that "[r]efusal to accept a position resulting from layoff or recall from layoff shall result in loss of seniority." (Findings of Fact, No. 7 & 8). It is clear from this language that a lay off is not the same as a termination under the CBA, since, as indicated, a lay off does not result in an immediate loss of seniority while a termination does. Accordingly, the majority concludes that Mr. Lopez was not "terminated" when he was laid off and that he otherwise still held the status of an "employee" when he applied for retiree health insurance benefits in August 2004.

This finding is consistent with Article 1.2 of the parties' recognition article, which reads: "Definition of Employee – *Unless otherwise indicated*, the term "employee" when used hereafter in this Agreement shall refer to all members of the...bargaining unit." *App. 27.* (Emphasis added). The "unless otherwise indicated" language allows coverage within the definition for individuals such as Mr. Lopez who have been members of the bargaining unit in the past and accrued certain benefits under the contract. As described above, the language of Article 14.1.B *indicates* that "eligible employees" will be eligible for the health insurance plan available to active employees. In other words, individuals, who are not currently members of the bargaining unit (or active employees), are still considered employees eligible for the health insurance plan. Thus, while a laid off employee may not be actively employed (i.e., working, receiving wages, accruing benefits), he or she is entitled to benefits that accrued to him or her during the term of active employment (and while a member of the bargaining unit).

Based upon a consideration of the relevant contract language, and in particular the two (2) conditions precedent set forth in Article 14.1.B, the majority determines that Mr. Lopez' employment status in August 2004 was such that he was eligible to receive retiree health insurance benefits. As a result, the nature of his grievance and whether in fact one was ever filed are of no consequence to these proceedings. The Board does conclude, however, that pursuant to Article 11.2, Mr. Lopez terminated his employment by virtue of his retirement and therefore was no longer eligible for recall. It should be further noted that the Board offers no opinion here on

the issue of when, if at all, a terminated employee is eligible to receive retiree health insurance benefits.

In summary, the majority finds that Mr. Lopez is eligible to receive retiree health insurance benefits under the parties' CBA, despite the fact that he was in lay off status at the time he retired. Accordingly, the District's refusal to provide Mr. Lopez with retiree health insurance benefits under Article 14.1.B would constitute an unfair labor practice under RSA 273-A:5 I (h) and it is therefore directed to continue in its providing him with such benefits in accordance therewith.

Signed this 21day of November, 2005.

Doris M. Desautel, Chair

By majority vote. Alternate Chair Doris M. Desautel and Board Member E. Vincent Hall voting in the majority. Member James M. O'Mara in the minority.

Member O'Mara's dissenting opinion:

I respectfully dissent from my colleagues and would find that Mr. Lopez is not eligible to receive retiree health insurance benefits. He was neither employed by the District nor a member of the bargaining unit at the time he applied for the benefits, and unless reduction in force provisions in the parties' CBA explicitly establish eligibility for him, which in my opinion they do not, I do not believe it is appropriate for this Board to grant it. Although Article 12.3 establishes a one (1) year recall list for laid off employees, in my view it does not specifically bestow any other benefits or standing upon such persons. Additionally, while Article 14.1.B establishes ten (10) years of employment and retirement after June of 1997 as two conditions for receiving retiree health insurance, my interpretation of the contract and the law is that there is at least one more; the individual must be an employee of the District. Mr. Lopez did not hold this status in August 2004. Accordingly, I would find that the District's refusal to provide Mr. Lopez with retiree health insurance benefits under Article 14.1.B would *not* constitute an unfair labor practice under RSA 273-A:5 I (h).

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